UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CHRISTOPHER CONLON,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:00cv1027 (PCD)
	:
WILLIAM AUSTIN,	:
Defendant.	:

RULING ON MOTION FOR SUMMARY JUDGMENT

Defendant[1] moves for summary judgment, arguing there are no genuine issues of material fact and he is entitled to judgment as a matter of law. This motion is **granted**.

I. JURISDICTION

This court has subject matter jurisdiction over plaintiff's claim pursuant to 28 U.S.C. § 1343(a)(3).

II. BACKGROUND

Plaintiff is a lieutenant in the West Hartford Fire Department. Defendant is the West Hartford fire chief. On April 22, 1999, during a quarterly meeting for fire department officers, defendant allegedly made derogatory statements regarding certain racial and ethnic groups that offended plaintiff. On July 12, 1999, plaintiff notified the West Hartford Department of Employee Services of the statements made by defendant at the quarterly meeting. On July 15, 1999, *The Hartford Courant* published a article discussing plaintiff's complaint.

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[1] Plaintiff initially sued William Austin in his individual capacity only in his complaint filed July 5, 2000. Plaintiff subsequently sought to amend his complaint to include the Town of West Hartford. The amendment, dated August 1, 2000, was denied by order dated August 3, 2000 for failure to comply with the Supplemental Order. Pleadings were ordered returned on January 4 and 5, 2001, with the stated reason "West Hartford is not a party" to this action. Plaintiff made no further attempt to add West Hartford as a party. William Austin is thus the only defendant in this case.

On July 17, 1999, plaintiff reported to a fire at a West Hartford residence. Defendant requested two of plaintiff's team to form a rapid intervention team. Plaintiff remained outside the structure to direct water on the exterior of the structure. Plaintiff and two men later entered the structure at the direction of Assistant Fire Chief Charles Hurley as part of an overhaul team to extinguish remaining hot spots. When the overhaul team exited the structure, Hurley commended them on their efforts and ordered the team to report to a rehabilitation area for nourishment, fluids and review by medical personnel. Plaintiff requested assistance from Hurley to provide personnel to retrieve the hose laid by the overhaul team. Hurley responded that he would speak to defendant. Defendant then ordered plaintiff and his team to retrieve the hose. Hurley later explained the situation to defendant, and defendant relented somewhat on the order.

On July 18, 1999, plaintiff met with Employee Services and complained of the events that transpired during the firefighting efforts. Plaintiff requested paid administrative leave during the investigation of the complaint, to which Employee Services responded that the request must be directed to defendant. On July 22, 1999, Employee Services forwarded the request for administrative leave to defendant. Defendant subsequently denied the request, having no knowledge of the second complaint, but recommended that plaintiff could use sick or vacation leave. There was no existing policy or procedure in place in the department that provided for paid administrative leave.

On August 12, 1999, Employee Services concluded its investigation of plaintiff's first complaint and found that defendant made inappropriate comments at the quarterly meeting but that defendant did not retaliate against plaintiff for the complaint. Defendant then offered a written apology to plaintiff for the remarks and Employee Services provided defendant with a written reprimand.

On October 14, 1999, Assistant Fire Chief Gary Allyn allegedly informed plaintiff that the scores on his evaluation would not be as high as they had been previously. Plaintiff immediately reported the discussion to Employee Services, which responded that nothing could be done unless the action were taken. In December, 1999, plaintiff registered a third complaint with Employee Services, although nothing came of Allyn's warning.

In February, 2000, plaintiff filed a complaint with the State Fire Marshal alleging the possibility of false inspection reports filed by West Hartford on March 15, 1999, that the plaintiff had been directed to conduct fire inspections without proper training and that the West Hartford training was substandard. On February 24, 2000, the Bureau of Investigation for the State Fire Marshal responded that the allegations constituted more than negligence, thus the proper investigatory agency was the local police department. Plaintiff then registered a verbal complaint with the West Hartford Police Department.

On December 8, 1999, plaintiff attended a medical response technician class. When asked his opinion of the class by Assistant Chief Hurley, plaintiff responded that "there's no real teaching going on here." On February 14, 2000, plaintiff filed a complaint with the State Department of Health against Assistant Chief Allyn alleging that medical response technician classes were being canceled and participants in the classes were not receiving the requisite training.

On October 25, 2000, plaintiff met with Employee Services. Plaintiff first stated that he was transferred to another fire station, a decision with which he did not take issue. Plaintiff also stated that he attended a union meeting while on duty and was ordered back to the fire station. There is no written policy prohibiting on duty personnel from attending union meetings.

On May 23, 2000, plaintiff registered a complaint with Employee Services regarding his evaluation of subordinate employees. In 2000, as in previous years, lieutenants forwarded evaluations to battalion chiefs, who in turn forwarded the evaluations to defendant indicating concurrence to or disagreement with the lieutenants' comments. In 2000, the battalion chief disagreed with the recommended comments on evaluations made by plaintiff, and defendant subsequently adopted the battalion chief's recommendations.

On December 21, 2000, Employee Services sent plaintiff a letter detailing the outcome of its investigation of plaintiff's allegation of a hostile work environment. Employee Services concluded that the allegations did not substantiate the claim of a hostile work environment.

Plaintiff sues the defendant in his individual capacity under 42 U.S.C. § 1983, claiming that defendant violated his constitutional rights to free speech and equal protection. He claims that defendant violated his right to free speech by retaliating against him for his complaint to Employee Services regarding statements derogatory to certain minority groups and by placing him and his men at risk during firefighting efforts. Plaintiff further claims that defendant denied him equal protection of the law by refusing to grant his request for administrative leave.

III. DISCUSSION

A. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities must be resolved and all reasonable

inferences be drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). The nonmovant cannot rest on the pleadings; *Anderson*, 477 U.S. at 256; but must supplement the pleadings with affidavits, depositions, and answers to interrogatories, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Alleged Violation of Right to Free Speech

Plaintiff claims that defendant violated his constitutional right to free speech by carrying out a number of acts designed to punish him for exercising this right through complaints filed with Employee Services. Defendant disagrees, arguing that the matters complained of were not protected speech for First Amendment purposes, that there was no adverse employment decision and that there is no causal connection between the speech and any adverse employment decision.

"[A] plaintiff making a First Amendment retaliation claim under § 1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination." *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 553 (2d Cir. 2001). Defendant claims that plaintiff has failed to establish a genuine issue of material fact as to any of the three elements.

1. Whether Speech Was Constitutionally Protected

The determination of whether speech is protected under the First Amendment is a question of law. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). Although a question of law, a

determination of whether speech is protected invokes a fact-intensive inquiry into whether the speech "addresses a matter of public concern." *Lewis v. Cowen*, 165 F.3d 154, 161 (2d Cir.), *cert. denied*, 528 U.S. 823, 120 S. Ct. 70, 145 L. Ed. 2d 60 (1999). A matter of public concern involves "any matter of political, social, or other concern to the community." *Id.* "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Diesel v. Lewisboro*, 232 F.3d 92, 108 (2d Cir. 2000) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). "In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis*, 165 F.3d at 163-64.

The undisputed facts raise establish a genuine issue of material fact as to whether the speech addressed a matter of public concern. Racism in a public agency is inherently a matter of public concern, provided the matter is not related purely to a dispute between plaintiff and defendant. *Connick*, 461 U.S. at 148 n.8; *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir.1993), *cert. denied*, 510 U.S. 1164, 114 S. Ct. 1189, 127 L. Ed. 2d 539 (1994). The first complaint lodged by plaintiff with Employee Services involved defendant's remarks disparaging certain racial or ethnic groups. Plaintiff's complaint as a result of the remarks was not uniquely "personal in nature and generally related to [plaintiff's] own situation." *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir.), *cert. denied*, 502 U.S. 1013, 112 S. Ct. 657, 116 L. Ed. 2d 749 (1991); *Ericson v. Meriden*, 113 F. Supp. 2d 276, 290 (D. Conn. 2000) (complaint based on employer's retaliation for employee's claim of hostile work environment not matter of public concern).

Defendant's argument that the statements were justified as recounting past experiences or in the context of fanfare in the projected year 2000 problems do not render the remarks appropriate. *See Woodard v. Gulfport*, 54 F. Supp. 2d 1305, 1308 (M.D. Fla.1999) (protected speech when complaint involves racial slurs, ethnic, gender or sexual jokes and violation of suspects' rights during arrests). Employee Services' investigation into plaintiff's complaint concluding the remarks were inappropriate further support the claim. Moreover, the fact that the complaint was the subject of the July 15, 1999 newspaper article further support plaintiff's claim that the matter was of public concern rather than purely private interest.

Plaintiff's complaint addressing the safety of firefighters also touches on a matter of public concern, as it sought "to bring to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. A report documenting concerns as to activities jeopardizing the safety of others invokes a matter of public concern. *See Carlucci v. Kalsched*, 78 F. Supp.2d 246, 253 (S.D.N.Y. 2000); *Lowe v. AmeriGas, Inc.*, 52 F. Supp. 2d 349, 359 (D. Conn. 1999), *aff'd*, 208 F.3d 203 (2d Cir. 2000); *Fire Fighters Ass'n, D.C. v. Barry*, 742 F. Supp. 1182, 1192 n.21 (D.D.C. 1990). The mere fact that plaintiff's complaint may have arisen in the context of a personal dispute does not eliminate the possibility that the matter will be one of public concern. *Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ.*, 776 F.2d 443, 451 (3d Cir. 1985). Defendant's motion for summary judgment on this ground is therefore denied.

2. Whether the Defendant Suffered an Adverse Employment Decision

Defendant also moves for summary judgment claiming that plaintiff has suffered no adverse employment decision. Plaintiff argues that the adverse employment decisions involved include

defendant's order to stow the hose after the fire was extinguished after he filed the complaint detailing the discriminatory remarks, defendant's refusal to commend plaintiff on the recommendation of another lieutenant in the fire department for actions at the scene of a tanker truck accident, and defendant's placing a number of negative memoranda in his pending file.

The Court of Appeals for the Second Circuit defines adverse employment decision broadly. *Lovejoy Wilson v. Noco Motor Fuel, Inc.*, Nos. 00-7919, 00-7969, --- F.3d ----, 2001 WL 998037, at *12 (2d Cir. Aug. 31, 2001). Adverse employment decisions include "discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand," *id.* (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999), but also includes lesser actions such as "negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities." *Id.*

Plaintiff has not established an adverse employment decision made by defendant. Plaintiff has not adduced evidence indicating either that defendant's decision to send him in the house to fight the fire without adequate backup was more than a tactical decision or that defendant's order to retrieve the hose was other than a miscommunication between the two supervisors, Hurley and defendant, giving separate orders to fight the fire. By plaintiff's own admission, two actors at the scene of the fire directed his action. Defendant ordered him not to enter the structure; Assistant Chief Hurley ordered him to enter the structure. Defendant ordered him to retrieve hoses prior to discussions with Hurley, then modified the decision and obtained assistance for the team, in compliance with the standard

operating procedures. Plaintiff appears to allege a disagreement with the manner in which firefighting efforts were carried out and point out conflicts that inevitably arise when two supervisors are issuing orders simultaneously. Defendant did not retaliate against plaintiff by issuing orders with which plaintiff disagrees. *See Brodetski v. Duffey*, 141 F. Supp. 2d 35, 46 (D.D.C. 2001) ("by cataloguing the disagreements and one-time run-ins with particular co-workers, plaintiff merely demonstrated conflict within the office, not adverse employment actions"). The affidavits and supporting documents substantiate nothing more than a disagreement between the parties. The documents do not evince a scheme to harm plaintiff.

Plaintiff further cites to no evidence of entitlements stripped from him by defendant or harms to his prospects for the future as a result of defendant's actions. Exhibits provided by plaintiff are, at best, evidence of pending files maintained by the battalion chief and assistant chief of operations; these exhibits do not support plaintiff's claim that defendant had such a file. Maintaining a personal file does not harm the employee, even if doing so is in violation of an internal office policy. Had defendant maintained a negative stockpile of information and later used the information in the file to support the construction of a tangible record, such as an evaluation, plaintiff might support a claim of an adverse employment decision.

Plaintiff's claim that failure to issue a commendation constitutes an adverse employment decision similarly fails. Had plaintiff submitted some evidence that he was entitled to such commendation, it would be possible to conclude that defendant's action harmed him in some way. Plaintiff produced no support for his claim that the commendation was more than a discretionary decision by defendant. It is of little consequence that a peer or coworker found his conduct

commendable but defendant, his supervisor, did not. Similarly, refusal to grant paid administrative leave when there is no evidence of similar request being granted does not constitute an adverse decision. *See Montgomery v. Birmingham*, No. 98-AR-2100-S, 2000 WL 1608620, at *9 (N.D. Ala. Jan. 20, 2000), *aff'd*, 237 F.3d 636 (11th Cir. 2000) (refusal to grant vacation request not adverse employment decision). Defendant's motion for summary judgment is granted for failure to establish an adverse employment decision.

C. Equal Protection

Plaintiff asserts that Defendant singled him out by maintaining a pending file on him, affording him shorter notice of his transfer to another station and ordering him out of a union meeting and back to the fire station.

"The Fourteenth Amendment guarantee of equal protection is 'a right to be free from invidious discrimination in statutory classifications and other governmental activity.' . . . That right is violated when the state distinguishes between individuals based on 'unreasonable, arbitrary, or capricious differences that are irrelevant to a legitimate government objective.'" *Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996). "A violation of equal protection by selective enforcement arises if: '(1) the person, compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996) (citation omitted; alteration in original).

Plaintiff fails to establish a genuine issue of material fact as to selective treatment when "compared to others similarly situated." *See id.* Plaintiff concedes that no agreement with West

Hartford expressly permits him to attend union meetings while on duty. He also has no evidence that others similarly situated were allowed to do so. Plaintiff similarly has not adduced any evidence, other than his own opinion, that defendant maintained negative records of him and of no others in the department. The only evidence of records of any kind he produces in opposition to the motion for summary judgment are those of the battalion chief and assistant chief.

The third basis for plaintiff's equal protection claim is that he was transferred with intentionally short notice. He alleges that others knew in advance of his impending transfer but intentionally refused to notify him. Plaintiff again fails to connect defendant in any way to the two-day notice he was given prior to transfer. Defendant also produced the affidavit of a battalion chief who was required to transfer on only one day's notice. Plaintiff "may not rely on conclusory allegations or unsubstantiated speculation"; *Scotto v.. Almenas,* 143 F.3d 105, 114 (2d Cir.1998); to defeat defendant's motion for summary judgment. He has thus failed to produce any support for his allegations that he was somehow singled out of an identifiable group by defendant. *See, e.g.,United States v. Sparks*, 2 F.3d 574, 580 (5th Cir. 1993) (failure to establish unique treatment in comparison to identifiable group fatal to selective enforcement or selective prosecution claim), *cert. denied sub nom. Spignor v. United States*, 510 U.S. 1056, 114 S. Ct. 720, 126 L. Ed. 2d 684, *and cert. denied*, 510 U.S. 1080, 114 S. Ct. 899, 127 L. Ed. 2d 91 (1994); *United States v. Dukehart*, 687 F.2d 1301, 1303-04 (10th Cir. 1982) (same); *Babiker v. Ross Univ. Sch. of Med.*, No. 98 CIV 1429 THK, 2000 WL 666342, at *5 (S.D.N.Y. May 19, 2000) (granting summary judgment for failure to establish that plaintiff was singled out for oppressive treatment as opposed to others similarly situated); *Montavon v.*

Southington, No. 3-95-CV-1141, 1997 WL 835053, at *3 (D. Conn. Sept. 29, 1997) (same). Accordingly, defendant is entitled to summary judgment on the equal protection claim.

IV. **CONCLUSION**

Defendants' motion for summary judgment (doc. 21) is hereby **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, September __, 2001.

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Peter C. Dorsey
Senior United States District Judge